

in length, ⁴ the videotape contains graphic depictions and descriptions of female genitalia, the uterus, excreted uterine fluid, dismembered fetal body parts, and aborted fetuses. This portion of the videotape depicts these activities and materials in a manner which is patently offensive according to contemporary community standards. This is so in light of the context of the entire video. The Court further concludes that the evidence shows that the images, words, and depictions in the videotape would be readily understandable to children in the audience.

In addition to the video, WAGA-TV provided testimony concerning viewer reactions to the previous one-minute spot. Many calls were taken; they were longer and more involved than those which the station usually receives in response to programming. The evidence supports the conclusion that the previous video was much less graphic and did not contain views of the female sexual organ. WAGA-TV also presented expert testimony of two psychiatrists concerning the effect of the video on children. Both psychiatrists testified that the videotape would have a negative impact on children in the viewing audience. Thus, the Court concludes, that viewing the evidence in its entirety, there is ample support for the conclusion that the videotape contains indecent materials,

⁴ The section at issue goes from 428 on the VCR counter to 877 on the counter.

the broadcasting of which is prescribed by 18 U.S.C. § 1464.

3. May WAGA-TV channel the Videotape into the safe harbor hours of 12 midnight and 6:00 a.m.?

In Action for Children's Television v. F.C.C., 932 F.2d 1504 (D.C. 1991), the court rejected a twenty-four hour ban on the broadcasting of indecent materials. However, the court also made clear that some regulation will withstand constitutional scrutiny. Id. The court directed the FCC to develop a "safe harbor" exception to its regulation of indecent broadcasts: that is, a time in which indecent material may be broadcast.

Congress has also directed the FCC to create regulations designating the hours between 12 midnight and six a.m. as safe harbor hours. The FCC has begun to implement the Congressional mandate. See FCC Proceeding to Implement Regulations to Restrict Broadcasting of Indecent Programming, 1992 FCC LEXIS 5392 (September 17, 1991). Mr. Sander, president of WAGA, testified that significant numbers of children would be watching television between 4:00 and 5:00 p.m. on Sunday. Mr. Sander further testified that between the hours of nine and ten, the percentage of viewers between the ages of 2 and 17 would still be significant, although there may be more supervision. The number of children in the audience would decline as the

evening progresses. WAGA also presented the testimony of two psychiatrists who stated that although parental supervision may lessen the detrimental effects on children, it may also exacerbate them. Jack Sander further testified that during the time slot of 12 to 6, everyone is not asleep. Rather, late night ratings are comparable to weekend day programming with regard to the adult viewing audience.

The Court concludes that WAGA-TV has presented sufficient evidence to support the conclusion that the videotape should be shown between 12:00 midnight and 6:00 a.m. The court is convinced that this time slot best accommodates the two competing interests and rights: the interest in protecting children from indecent materials and Mr. Becker's right to broadcast his political advertisement.

4. First Amendment

Neither this Court's order, nor Plaintiff's compliance therewith act as prior restraints on Defendant's speech in violation of the First Amendment. A content-based restriction on speech, especially political speech, must be "a precisely drawn means of serving a compelling state interest" to withstand constitutional scrutiny. Action for Children's Television v. FCC, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988). The Supreme Court has found the

government's interest in "safeguarding the physical and psychological well-being of a minor" to be compelling. New York v. Ferber, 458 U.S. 747, 756-57 (1982). Accordingly, the Circuit Court for the District of Columbia recognized that the FCC may regulate indecent material, so long as it does so with "due respect for the high value our Constitution places on freedom and choice in what the people say and hear." Action, 852 F.2d at 1344.

This Court's order does not deprive Defendant of the ability to air his advertisement on Plaintiff's programming. It merely channels what is decidedly indecent material to a time slot that sufficiently reduces the chances of injury to the "psychological well-being" of minors in the community. Thus, this Court's Order does not violate Defendant's First Amendment rights.

C. Injunctive Relief

WAGA seeks injunctive relief against Becker, the Becker Campaign and the FCC. The Court concludes that WAGA has met its burden with respect to Becker, and the Becker campaign. First, WAGA has proven that it will prevail on the merits of its claim, as discussed above. Second, WAGA has proven that it faces a substantial threat of irreparable injury. WAGA faces the dilemma of choosing between seemingly conflicting obligations as a broadcaster, and the failure to comply with either one could result in

revocation of its license. Furthermore, and perhaps most importantly, WAGA faces the possibility of substantial public disapproval of its broadcasting the videotape during hours in which children are very likely to see it. The evidence demonstrates that WAGA received numerous phone calls in response to the last advertising of Defendant Becker's, and testimony supports the conclusion that any effort to explain that WAGA was under a legal obligation to do so was ineffective in diminishing the disapproval. The objectionable portion of this video is over four times as long as the previous video, and testimony supports the conclusion that this video is also much more graphic and contains images and descriptions absent in the last video.⁵ Third, WAGA has proven that its own injury outweighs the injury to Defendant Becker and the Becker campaign. The two Defendants are still free to air the political campaign video; it simply must be aired during a time in which children are less likely to see the indecent material contained within it. Finally, the Court concludes that a strong public interest supports injunctive relief: protecting children from indecent materials, an interest recognized by many courts and by the legislative body as compelling.

⁵ The FCC ruled that the previous video was not indecent under 18 U.S.C. § 1464. Defendants' Exhibit 1.

The Court's conclusion, however, is different with respect to the FCC. First, as discussed above, under normal circumstances, this Court would have invoked the primary jurisdiction doctrine, thus allowing the FCC to pass on the issues at hand. Given the circumstances, the Court believes it would be improper to enjoin the activities of the FCC. To do so would upset the balance of power the primary jurisdiction doctrine is designed to protect. Second, this Court questions whether it has the power to enjoin the FCC from exercising its administrative powers. Clearly, judicial review of FCC's decisions and orders, including the power to enjoin enforcement of orders, lies with the court of appeals. See 47 U.S.C. § 402 and 28 U.S.C. § 2342. Finally, the Court remains convinced that WAGA has an adequate remedy with respect to any action taken by the FCC which may be contrary to this Order: review by the court of appeals.

Thus, with respect to injunctive relief, the Court
HEREBY ORDERS:

Defendants Daniel Becker and the Daniel Becker for Congress Committee are enjoined and restrained from requiring WAGA-TV to air the Becker videotape at any time other than between the hours of 12:00 midnight and 6:00 a.m..

CONCLUSION


In conclusion, the Court GRANTS WAGA's request for declaratory relief. The Court GRANTS WAGA's request for injunctive relief against Defendant Becker and Becker's Campaign. The Court DENIES WAGA's request for injunctive relief against the FCC.

Furthermore, the Court has been informed by counsel for the FCC that they expect to rule on the issues presented in this Order by 5:00 today. In the event that the FCC does issue an order specifically ruling on each of the issues presented in this case as follows:

- (1) Does the prohibition against the broadcasting of indecent material constitute an exception to the requirements of reasonable access, equal opportunities and no censorship?
- (2) Is the Videotape indecent under 18 U.S.C. § 1464?
- (3) May WAGA-TV channel the Videotape into the safe harbor hours of 12 midnight and 6:00 a.m.?

this order shall become MOOT.

So ORDERED this 30th day of October, 1992.



ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

APPENDIX B

The New York Times

June 11, 1992, Thursday, Late Edition - Final
SECTION: Section A; Page 18; Column 1; National Desk

LENGTH: 1113 words

HEADLINE: THE 1992 CAMPAIGN: Media;
Picture Is Jumbled on Which Abortion Messages Can Get on TV
BYLINE: By JAN HOFFMAN

BODY:

This spring, television stations reaching the Ninth Congressional District in southeastern Indiana broadcast commercials for an anti-abortion candidate that included photographs of dead, late-term fetuses.

But a Buffalo station rejected a much less explicit advertisement by the National Abortion Rights Action League showing the Statue of Liberty and a billowing American flag as a narrator's voice pleads to make "abortion less necessary" by encouraging sex education and birth control.

"TV stations never accepted my pro-life scripts before," said Mr. Bailey, who founded the nonprofit Christian Media Ministries, which makes religious commercials. "Running for Congress gave me the opportunity to say, 'Hey, you've got to run these.' "

But the rules change strikingly for advertisements promoting a point of view instead of a political candidate. Whether on abortion or other concerns, such issue-centered advertising is only minimally regulated by the commission, so television networks and stations have enormous discretion in deciding which spots they will run.

The major networks and many local stations have a uniform policy against advertisements dealing with issues, while other stations scrutinize them on a case-by-case basis.

In April, when Operation Rescue, an anti-abortion group, was trying to shut down clinics in Buffalo, the National Abortion Rights Action League had mixed success getting its relatively mild advertisements on the air.

David R. Luka, national sales manager for the CBS affiliate in Buffalo, WIVB, turned down the group's advertisements. "Even if Operation Rescue had not been in town, I'd question the ad," he said. "It's a sensitive issue, and we elected not to get involved."

The two other network-affiliated stations in Buffalo did broadcast the abortion-rights spots, which ran in April.

"More stations are accepting the ads now because of the recession, and because the consequences for running them aren't as bad as they feared," said Kim Haddow, of a Washington-based media consulting firm, Greer, Margolis, Mitchell, Grunwald & Associates

Inc.

Many broadcasting experts say television officials go to unusual lengths to scrutinize spots involving abortion, whether they are from abortion-rights groups like Naral and the Planned Parenthood Federation of America, or anti-abortion groups like the National Right to Life Committee and the Arthur S. De Moss Foundation, a Philadelphia-area Christian organization.

In April, before Naral could run a \$200,000 national two-commercial campaign on CNN and some local stations in Washington and Philadelphia, the group was not only asked to submit scripts for approval, but also to file papers substantiating testimonials in the advertisements from two older Americans who said their mothers had died from illegal abortions.

One spot features a 67-year-old former marine, Jim Friedl, whose mother died when he was 4. Stations required Mr. Friedl to provide copies of his mother's death certificate, which states that she died of an overdose of a drug intended to induce abortion. Mr. Friedl also had to present copies of his own birth certificate, and his 30-year service record with the Marine Corps.

Groups seeking to run anti-abortion ads have encountered similar requests for documentation. This spring, the De Moss Foundation has tried to buy time for its "Life. What a Beautiful Choice" advertisements, in which a narrator says that the parents of the children shown in the advertisement chose to give their children up for adoption rather than to have abortions.

The Washington station WJLA, an ABC affiliate, said last month that it would not run the De Moss advertisements without documentation that the children shown had been adopted. The station recently accepted a new De Moss advertisement that emphasizes adoption but does not make the factual claims that appeared in the first ones.

Rejections From CNN

The Turner Broadcasting System agreed to run the original De Moss advertisements on its four cable networks, CNN, Headline News, TNT and TBS, without any documentation. Steve Haworth, a spokesman for CNN, said that because none of the individuals in the advertisement were identified, CNN did not require proof that the children shown were adopted.

Officials of the De Moss Foundation refused to discuss their advertisements. Both the Naral and De Moss advertisements contain disclaimers at the beginning and end naming the group that paid for the ad.

Last spring CNN rejected two of four spots by Planned Parenthood. One was rejected because CNN was not satisfied with the documentation for its assertion that a teen-ager's death was directly caused by an abortion law that required parental consent.

The other, in which a teen-ager, talking on the telephone, confides that she has just had an abortion and then faints, was deemed too strong.

Advertisements by political action committees on behalf of a particular candidate, like generic issue advertisements, are subject to discretionary station policies. In the bitter 1990 North Carolina race between Senator Jesse Helms and his Democratic challenger, Harvey Gantt, who favored abortion rights, the state Republican Party sent a letter to stations planning to broadcast Naral's spots supporting Mr. Gantt, which reminded them that they were under no obligation to do so.

The National Right to Life Committee has sponsored both issue advertisements and political spots for candidates. The group's series of so-called educational spots, with the tagline "Abortion Stops a Beating Heart," has run on local cable stations around the country. In the 1990 Virginia governor's race, its political action committee prepared advertisements for the anti-abortion candidate, Marshall Coleman. The spots met with only limited success at local stations, some of which did run Naral's political advertisements for his successful opponent, L. Douglas Wilder.

"The reasons were arbitrary," Nancy Meyers, a spokeswoman for the anti-abortion group, said.

GRAPHIC: Photos: A commercial claiming to show children given up for adoption rather than aborted. Documentation has been requested to prove that the children in the ad were indeed adopted; Before an abortion rights group could run a \$200,000 national two-commercial campaign, it was asked to submit scripts for approval and file papers substantiating testimonials in the advertisements.

TAB

The Atlanta Journal and Constitution
July 4, 1992

SECTION: NATIONAL NEWS; Section A; Page 1

LENGTH: 719 words

HEADLINE: Abortion ads anger Braves viewers Candidate: They're
'necessary offense'

BYLINE: By Philip P. Pan STAFF WRITER

KEYWORD: advertising; abortion; television; atlanta/braves;
politics; reaction

BODY:

Two graphic campaign commercials that claim to show bloody, aborted fetuses aired for the first time during the Atlanta Braves game Friday night, and viewers bombarded the TV station and the candidate with angry phone calls.

The first ad - which appeared after the fifth inning - shows a newborn baby as "Choice A" and then cuts to "'Choice B," pictures of what are described as fetuses from third-trimester abortions.

When something is so horrifying that we can't stand to look at it, then why are we tolerating it?" says Daniel Becker, the GOP 9th Congressional District candidate who purchased the 30-second ads.

Mr. Becker said, in an interview Friday night, that the fetuses were taken from garbage dumpsters outside abortion clinics, and that he has affidavits to prove it.

The second ad, broadcast after the eighth inning, shows the candidate holding his newborn niece. He says she could have been aborted six days ago, and then switches to more footage of what is claimed to be aborted fetuses.

Mr. Becker issues a warning to viewers before the first commercial, but not the second. WTBS placed a 5-second disclaimer before the second one.

An estimated half-million people watched the Braves game Friday night.

The WTBS switchboard was jammed after the ads were broadcast, with many viewers unable to get through to register complaints. Mr. Becker, who is running in the North Georgia district, said his phone was ringing constantly with calls from angry viewers.

A 19-line voice mailbox for viewer response was busy most of the evening. Some those viewers called the The Atlanta Journal-Constitution to complain.

Scott Sassa, president of Turner Entertainment, in an interview after the ads were broadcast, apologized for the commercials, but said the television station is legally required to run the commercials, even during prime time.

Mr. Sassa said the ads were in bad taste and the station

normally would have rejected them. However, broadcast stations are prohibited by the FCC from refusing or censoring any federal candidate's commercial even if it is libelous, vulgar or in bad taste.

"We spoke for hours with our counsel in Washington, trying to figure out a way to get this off the air. But the rules are very clear that politicians can do whatever they want to do," Mr. Sassa said.

He said angry viewers should contact Mr. Becker and their representative in Washington and "tell them that this is an outrage and an abuse of the political system."

Under Georgia state law, third-trimester abortions are allowed only if the mother's life or health is threatened.

Mr. Becker defended the two ads and said they were a "a necessary offense to get the message out to the people."

But callers to The Journal-Constitution, including some who said their children were watching the broadcast, said the commercials were inappropriate.

"I'm outraged. It may have something to do with my wife being nine- months pregnant," said Joe Cochran, 32, of Marietta. "We're expecting our first child. I love the Braves, but I'll never watch another Braves if that kind of commercial is aired again."

Mr. Becker, who lives in Canton, faces three opponents in the Republican primary July 21. Two of them are anti-abortion, and one is pro- choice, but he is the only candidate endorsed by Georgia Right to Life, he said.

At 4th District GOP candidate, Jimmy Fisher, launched a similar anti- abortion campaign on local cable channels this week, but Mr. Becker's commercials reached far more viewers during the Braves game.

Mr. Becker said he plans to broadcast the two ads more than 400 times before the primary, on a variety of channels including CNN and ESPN.

Mr. Becker personally paid \$ 12,000 for the first five anti-abortion ads for broadcast during Braves games Friday night, Sunday afternoon, and Monday night.

He said he chose to advertise during the baseball games in an effort to reach to male audience and ask "fathers to turn their hearts once again to their little ones."

The commercials were originally scheduled to air during afternoon baseball games earlier this week, but Mr. Becker and station officials agreed that too many children might be exposed to the ads.

"This ad was not designed to overcome our ignorance. It was designed to overcome our denial," Mr. Becker said.

TAB

The Atlanta Journal and Constitution
November 1, 1992

SECTION: LOCAL NEWS; Section C; Page 8

LENGTH: 507 words

HEADLINE: ELECTIONS '92 TV stations split on airing graphic anti-abortion ad

BYLINE: By Anne Rochell STAFF WRITER

KEYWORD: politics; television; advertising; abortion; courts; rulings; protests

BODY:

An independent television station in Atlanta aired a congressional candidate's graphic, 30-minute anti-abortion commercial Saturday, but two network affiliates in Chattanooga refused to show it. They cited a federal court ruling Friday that allowed a station to pull the ad and run it after midnight.

A federal appeals court in Atlanta upheld the lower court's ruling late Saturday.

Earlier in the day, Republican Daniel Becker vowed to take the case to the U.S. Supreme Court if the appellate court allowed stations to reject his ad or put it into a late-night slot.

Mr. Becker's ad is indecent and unfit for family viewing, U.S. District Judge Robert Hall said Friday. A restraining order gave WAGA-TV (Channel 5) in Atlanta the option to move it from this afternoon after the Falcons football game to a slot between midnight and 6 a.m. Monday.

WVEU-TV (Channel 69) aired the ad Saturday night at 9. To somber piano music, the camera zoomed in as doctors removed a fetus, bit by bloody bit, from a woman's body. The doctor explained that the head of the fetus had to be crushed before it was removed. Several times during the explicit scenes, a disclaimer flashed on the screen: "Warning! Graphic footage will follow. Not suitable for children."

About 100 viewers called the station after the ad, and at least 75 percent were complaints, said WVEU spokeswoman Jennifer Ingram. "People said it was the most disgusting thing they ever saw and hung up on me," she said.

Mr. Becker said he thinks the stations that don't run his ad or delay it until late at night are guilty of censorship.

"If the media has the right to censor political speech, that's prior restraint," he said. "That's a clear case of censorship."

Mr. Becker's opponent in the 9th District race, Democrat Nathan Deal, accused Mr. Becker of using the controversial ad to get media attention.

"That's been his purpose all along," Mr. Deal said. "It's an emotional issue, and I think it's a shame."

Mr. Deal said abortion is a personal matter, and he supports a woman's right to choose.

Tom Tolar, station manager of Chattanooga's WRCB-TV (Channel 3), which reaches 9th District voters in Georgia, told viewers Saturday that the Becker ad had been judged by a federal court to be indecent, and therefore could air only between midnight and 6 a.m. It had been scheduled to air at 4 p.m. Saturday.

Seven viewers called the station and protested the pulling of the ad, said Carol Morgan, the station's switchboard operator. No one called in favor of the station's decision.

WTVC-TV (Channel 9) in Chattanooga also pulled the ad, set to air at 7:30 p.m. The station offered to air Mr. Becker's ad at 12:30 this morning, but he rejected it, said Mike Hood, the station's advertising manager.

Meanwhile Saturday, anti-abortion candidates for the U.S. Senate in Illinois and Colorado accused their local TV stations of illegally using Friday's ruling in Atlanta to pull similar ads from prime viewing hours.

TAB

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December 6, 1992, Sunday, Late Edition - Final

NAMES: Kent Conrad

SECTION: Section 1; Page 26; Column 1; National Desk

LENGTH: 964 words

HEADLINE: Senator Who Wouldn't Run Has Won

BYLINE: By MICHAEL deCOURCY HINDS, Special to The New York Times
DATELINE: FARGO, N.D., Dec. 5

BODY:

The nation's 1992 election season sputtered to an end with a special election for the United States Senate on Friday, amid snow flurries, bitter cold and unusual voter apathy for this civic-minded Great Plains state. Only about 25 percent of the voters went to polls, but they sent Kent Conrad back to the Senate by an overwhelming margin.

In winning the election, Mr. Conrad became the first Senator to have decided not to seek re-election and then to have won another seat, all within eight months and without affecting his seniority, Senate historians said.
Ran Positive Campaign

Mr. Conrad, 44 years old, ran a positive campaign that emphasized his work on reducing the Federal deficit and in improving farm programs, which are of overwhelming interest in this agricultural state that provides 10 percent of the nation's wheat. Mr. Conrad, a moderate Democrat, had been the front-runner, and he won the election by a ratio of almost 2 to 1, winning 102,887 votes, or 63 percent of the 162,452 cast.

In the general election in November, 307,00 people voted, or 68 percent of the state's residents over 18, putting it among the five states with the highest turnout. North Dakota is the only state that does not register voters before elections; people simply walk in and vote without declaring their party. That works because just about everybody knows their neighbors in North Dakota, which is not only the state least visited by other Americans but also the least populated.

"How sweet it is," Mr. Conrad told about 200 of his supporters at a celebration Friday night in Bismarck. "I think this election proves that hard work and straight talk still matter in North Dakota."

Mr. Conrad defeated two opponents. Jack Dalrymple, 44, a Republican state legislator who is a wealthy wheat farmer, received 54,726 votes, or nearly 34 percent. Mr. Dalrymple ran a negative

campaign attacking Mr. Conrad's record as a Senator and integrity. Mr. Dalrymple also promised voters that he would seek a substantial increase in Federal wheat subsidies.

Donald Larson, 50, a fund-raiser for organizations that oppose abortion, drew the most public attention to the monthlong campaign with television commercials showing aborted fetuses. Anti-abortion candidates used similar advertising in 13 other Congressional and Senate races this year and lost all the races amid widespread public criticism. Mr. Larson received 4,839 votes, or 3 percent.

In April, Mr. Conrad announced that he would not seek a second term, keeping with his 1986 campaign pledge that he would not seek re-election unless Congress, with his help, eliminated 80 percent of the annual Federal deficit.

Many people in North Dakota were stunned that a politician would honor such a commitment, especially since it had not been a central theme in his campaign, political analysts here say. Still, Mr. Conrad's popularity soared after his announcement, and he was widely expected to run in 1994, when it was thought that Mr. Burdick, also a Democrat, would retire.

But five months later Mr. Burdick died. The state's Democratic leaders encouraged Mr. Conrad to run. Newspaper polls showed that nearly 75 percent of the electorate supported his entry into the race and did not consider it a violation of his pledge. "When my seat came up, I declined to run in order to keep my word," Mr. Conrad said on Sept. 22 in announcing his candidacy. "Now, with the death of Senator Burdick, we face a new situation."
Deep Dakota Roots

Mr. Conrad is a fourth-generation North Dakotan, which means his great-grandparents were among the first homesteaders in this 103-year-old state. His parents died in a car wreck when he was 5, and he was raised by his grandparents in Bismarck.

In 1976, he narrowly lost when he ran for State Auditor, but in 1980, and again in 1984, he was elected Tax Commissioner. In 1986 he ran for the Senate and won an upset victory over Senator Mark Andrews, who had represented North Dakota in the House and Senate for 23 years.

Shortly after his election, Mr. Conrad married Lucy Calautti, and each has a child from a former marriage. For the past 18 years, Ms. Calautti has worked for United States Representative Byron L. Dorgan, most recently, as his chief of staff. Mr. Dorgan, a Democrat, was elected to the Senate in November to fill Mr. Conrad's seat. "Working with Byron is going to be terrific," Mr. Conrad said Friday night. "He's my best friend."

North Dakotans traditionally split their ticket as they did in November. President Bush easily carried the state, which has not supported a Democratic Presidential candidate since 1960, and Ed

Schafer, a Republican, was elected Governor. But North Dakotans sent two Democrats to Congress: Mr. Dorgan was elected to the Senate, and Earl Pomeroy, a former state insurance commissioner, won Mr. Dorgan's House seat, which is the state's only one.

North Dakota politics is a small pond, and Mr. Conrad, Mr. Dorgan and Mr. Pomeroy have worked with or for one another in the past. "It's going to be just like old times," Mr. Conrad said.